

## “AND TO DECLARE AN EMERGENCY”

The Initiative and Referendum is a comparatively recent innovation in American government. Within the last fifty years, it has been incorporated into the constitutions of a considerable number of the states. The Initiative and Referendum provides for direct legislation, i.e., legislation by the voters themselves. The typical provisions allow for the initiation of a bill by securing the signatures of a certain per cent (3% to 10%) of the voters of the state or of the voters at the last gubernatorial election. After the required number of signatures is filed, the bill is placed on the ballot for a referendum vote. For passage, some states require that the bill receive a majority of the votes cast on the question of the bill itself, and other states require that the bill receive a majority of the total votes cast at the election. Also, the referendum may be used alone to place before the voters bills which have already been passed by the legislature and signed by the governor. Such a bill will be placed on the ballot for ratification if a sufficient number of voters petition for such referendum within a specified time after the passage of the bill.

However, not all bills are subject to the referendum. In particular, “emergency laws” are exempt, and to the extent that “emergency laws” are passed, the right of the people to have a referendum on unpopular legislation is limited. It is with this use of the referendum by the voters and the use of the “emergency laws” by the legislature that we are here concerned.

The Initiative and Referendum amendment to the Ohio Constitution was made a part of the fundamental law of our state along with other major amendments in 1912. Its provisions as to the time at which laws will take effect are as follows:

### ART. II

Sec. 1c—*Initiative and Referendum*— . . . . “no law passed by the General Assembly shall go into effect until ninety days after it shall have been filed by the governor in the office of the secretary of state,” except . . . .

Sec. 1d—*Initiative and Referendum*—“Laws providing for tax levies, appropriations for the current expenses of the state government and state institutions, and emergency laws necessary for the immediate preservation of the public peace, health and safety, shall go into immediate effect. Such emergency laws, upon a ye and nay vote must receive a vote of two-thirds of all members elected to each branch of the general assembly, and the reasons for such necessity shall be set forth in one section of the law, which section shall be passed only upon a ye and nay vote, upon a separate roll call thereon. The laws mentioned in this section shall not be subject to referendum.” (adopted Sept. 3, 1912.)

The ninety-day clause was inserted to afford the voters a chance to circulate petitions to procure a referendum. The other clause automatically places certain measures beyond the reach of the referendum and allows the legislature to do the same in other cases where a situation arises that demands immediate action.

It would seem that the provision making tax and appropriation measures immune from the referendum and the provision allowing for the passage of emergency legislation to avoid the ninety-day postponement of taking effect are sensible and practical and necessary for expediting the business of legislation. It is just as apparent that both these provisions are definite inroads on the power of the people to legislate directly.

It has been up to the courts to say whether or not the legislatures, under the constitutional provisions, shall have a free hand in declaring emergencies. Is there any check on their power to declare emergencies?

1. The statement of an emergency by the legislature is conclusive.

#### ARKANSAS

*Hanson v. Hodges*—109 Ark. 479; 160 S.W. 395. (1913)

Emergency . . . "is a question exclusively for legislative determination . . ."

#### COLORADO

*VanKleeck v. Ramer*—62 Colo. 4; 156 Pac. 1108. (1916)

Declaration of emergency is conclusive and not reviewable by the court . . .  
"in so far as it abridges the right to invoke the referendum."

#### ILLINOIS

*Wheeler v. Chubbuck*—16 Ill. 361. ((1855)

"The general assembly is the sole judge of the emergency." But the assembly must make the statement of the emergency unequivocal.

*Murray v. Holmes*—341 Ill. 23; 173 N.E. 145. (1930)

The court, in effect reversed the earlier Illinois decision, for without any statement of policy, they weighed the emergency and found that it was not sufficient.

#### INDIANA

*Hendrickson v. Hendrickson*—7 Ind. 13. (1885)

The court merely said that the statement that a law should take effect sooner than the ordinary time was not a declaration of an emergency.

*Mark v. State*—15 Ind. 98. (1860)

The act contained no declaration of emergency, and thus it did not go into effect until the other laws of that session. However, a declaration of emergency would have been sufficient to accomplish this.

#### NEBRASKA

*State v. Pacific Express Co.*—80 Neb. 823; 115 N.W. 619. (1908)

Merely saying that this shall take effect "on and after its approval" does not declare an emergency so that it will take effect immediately.

#### OKLAHOMA

*Oklahoma City v. Shields*—22 Okla. 365; 97 Pac. 1014. (1908)

"It is a question of which the legislature must be the judge, and when it decides the fact to exist, its action is final."

#### OREGON (leading state)

*Biggs v. McBride*—17 Ore. 640; 21 Pac. 878. (1889)

The statement of emergency—giving law effect at the time of its passage is conclusive on the courts.

*Kadderly v. Portland*—44 Ore. 118; 74 Pac. 710. (1903)

"Question whether a given law . . . may be put into operation by adding an emergency clause is distinctly for the legislature . . . and not judicially reviewable."

*Sears v. Multnomah County*—49 Ore. 42; 88 Pac. 522. (1907)

The court held that the emergency clause failed, for the legislature had not stated that it was necessary for the immediate preservation of the public peace, health and safety. But if the legislature had made this statement, the court would not have investigated.

#### SOUTH DAKOTA

*State v. Levan*—14 S. D. 394; 85 N.W. 605. (1901)

"It seems to have been uniformly held under constitutions containing an emergency clause and providing that laws containing such a clause shall take effect as therein directed and that the action of the legislature is conclusive on the courts."

*State v. Whisman*—36 S. D. 260; 154 N.W. 707. (1916)

The court stated that it would declare the emergency clause void if it found that there was *clearly* no emergency. Otherwise, the decision of the legislature was final.

#### TEXAS

*Day Land and Cattle Co. State*—68 Tex. 526; 4 S.W. 865. (1887)

"If the legislature states facts or reasons which in its judgement authorize the suspension of a rule and the immediate passage of a bill, the courts certainly have no power to re-examine that question and declare that the legislature came to an erroneous conclusion."

*Keaton v. Whittaker*—104 Tex. 628; 143 S.W. 607. (1912)

The Supreme Court simply refused to consider whether or not it had the power to investigate the emergency clause. It accepted the legislature's statement.

2. The legislature's statement of an emergency is not conclusive nor binding on the courts.

#### CALIFORNIA

*McClure v. Nye*—22 Cal. App. 248; 133 Pac. 1145. (1913)

The court decided that certain appropriations were "unusual" and thus could not go into effect immediately to avoid a referendum.

#### MICHIGAN

*Naudzius v. Lahr*—253 Mich. 216; 234 N.W. 581. (1931)

The court demanded only "real or substantial relation to the public health, etc. . . ." and in case that existed "all doubt will be resolved in favor of legislative judgement that it is immediately necessary." However, they held that the legislative word was not the last word.

#### MONTANA

*State v. Stewart*—57 Mont. 144; 187 Pac. 641. (1919)

"Statement by legislature that emergency exists and that the act passed is necessary to the preservation of peace," etc. . . . "is not conclusive."

#### WASHINGTON

*State v. Meath*—84 Wash. 302; 147 Pac. 11. (1915)

"Constitution says that no special law shall be passed where a general law can be made applicable" . . . and "courts will review" . . . legislation to see if this idea has been violated.

*State v. Howell*—85 Wash. 294; 147 Pac. 1159. (1915)

Doubt as to the existence of an emergency will be resolved in favor of the legislative determination.

We see, from these holdings, that some of the courts, led by Oregon, have left the question of whether or not a law should be withdrawn from the class of laws on which a referendum vote may be held, entirely to the discretion of the legislature. Other courts, led by Washington, have taken it upon themselves to decide this question.

It might be interesting to consider the merits of these two views briefly in relation to: (1) intent of the amendments; (2) possible abuse of the right by the public; (3) possible abuse by the legislature of the power to declare emergencies.

First: It would seem safe to say that the amendments were intended to check the action of the legislature except in cases where such check would be unwise. The difficulty arises when we try to decide what was intended to be included in the exceptions, "emergency laws necessary for the immediate preservation of the public peace, health and safety." The requirement "immediate preservation" would seem to call for the most urgent and serious demand for legislation. The provision was not to allow the legislature to set aside the

referendum but to make the referendum step aside when it interfered with the proper control of extraordinary situations which might arise.

Second: The probability of abuse by the voters is unlikely. Getting the required number of signatures to petitions is difficult. The stationary inertia of the voters is so great that even the use of the referendum is an event.

Third: The abuse of the power to nullify the right of referendum is limited by the requirement of a two-thirds vote of the membership of both houses of the assembly on the whole bill as well as on the section stating the emergency separately. (The details of this provision vary from state to state). This requirement might appear to be an adequate safeguard, but the fact that, during the 1933 and 1934 sessions of the Ohio State Assembly, of the some two hundred and ninety-five bills that were passed, one hundred and thirteen declared emergencies, gives rise to a doubt as to the preventative efficiency of the two-thirds requirement as a check on the legislature's abuse.

Ohio has taken its stand behind Oregon, and the attitude which the court will take seems settled although the leading case was decided by a four-to-three decision and only after much controversy.

The first case in which the court mentioned the conclusiveness of the decision of the legislative statement was *Miami County v. Dayton* which was consolidated with *State, ex Rel. Duncan v. Franklin County*, 92 Ohio St. 215; 110 N. E. 726 (1915). The court pointed to the question underlying the controversy in saying:

Evidently, the sole purpose of the constitutional requirement of a two-thirds majority in emergency measures was for the purpose of withdrawing such measures from the referendum provisions.

The only declaration made by the court in deciding the case which bears on the question was that the court would investigate the records to see if the constitutional requirement of a two-thirds vote had been met in passing the emergency provision, and if it had not, the act would go into effect at the end of the regular period. However, Judge Wanamaker made the following statement, which was not necessary to the decision of the case:

Manifestly, the legislature's judgement in that behalf, (referring to the deciding as to the emergency) as shown by the act itself and the records touching the same, is not conclusive.

The enthusiasm with which Judge Wanamaker's statement was received at the time *State, ex Rel. Durbin v. Smith*, 102 Ohio St. 591; 133 N. E. 457 (1921) was decided is evidenced by the statement in the opinion of that case relating to the conclusiveness of the legislative statement of an emergency:

No case has previously been presented to this court involving that question.

The court entirely disregarded the *Miami County* case, and started out anew. The majority opinion depended on *Kadderly v. Portland* (supra) saying that the Ohio Initiative and Referendum provision was copied from Oregon's. The majority laid down this rule:

Manifestly, this court cannot go outside of the provisions of the act and the facts which it judicially knows for the purpose of ascertaining whether the legislature had valid reasons for declaring this to be an emergency law.

The result of such an opinion was to place the use of the Initiative and Referendum under the control of the legislature.

Chief Justice Marshall led the dissent with an opinion in which he cited *State v. Meath* (supra) agreeing that the constitution did not intend to allow the legislature to declare an emergency where none existed. He quoted *State*

v. *Stewart* (supra) saying that the constitutional convention "did not intend that the exception should extend further than to those matters arising out of some unforeseen menace, public calamity, sudden emergency, extraordinary occurrence or unprecedented climatic condition." After thus setting out his requirements for an emergency, he said:

Provisions of the act must be such as are necessary to immediately avert threatened danger.

He evidently thought that the emergency clause was inserted, not to make possible the defeat of the referendum, but to allow for quick legislative action when an imperative situation required it. Any other attitude seemed to him to defeat the purpose of the amendment, and so, he felt that the final decision of the necessity and propriety of the emergency law should be left up to the Supreme Court.

Judge Johnson and Judge Wanamaker dissented in separate opinions. Judge Wanamaker observed that the term "emergency" was nowhere defined, and he felt that it was the right and duty of the court to establish this definition.

The Supreme Court refused a motion to certify in the case of *Menke v. Jackson*, No. 19536, March 16, 1926, which is reported in 4 Ohio Abstracts at p. 59. In this case, the city council of Garfield Heights, under Sec. 4227—3, General Code, had passed an emergency measure raising the salary of the mayor. The plaintiff sought to have the payment of the salary restrained because the ordinance was not an emergency measure within the meaning of the law. On the authority of the Durbin Case, the common pleas judge had sustained a demurrer to the petition stating that the court was without jurisdiction.

In 1929, a trial judge refused to follow the Durbin case. In *Burns v. City of Marietta*, 27 O. N. P. (N. S.) 497, the court refused to follow the majority opinion of the Durbin case but felt that the law was to be found in Judge Wanamaker's dissent.

The judgement of the general assembly as to the emergency character of an act under the constitutional amendment of 1912 is not conclusive, but its judgement in that behalf may be challenged in a proper proceeding at any day within the 90 day limit, either as to the constitutional vote or the emergency character of the act.

This statement was taken from Wanamaker's opinion in the case of *Miami County v. Dayton* (supra). The basis on which the trial judge decided that this was the law of Ohio was that it was disclosed in the dissent to the Durbin case that the majority opinion was a compromise decision, and that there were only two judges in favor of the pronouncement that the determination of the legislature should be final, whereas, in the *Miami County v. Dayton* case, all judges concurred in the statement of law quoted by Judge Wanamaker. This attitude seems more nearly to follow the intent of the constitution.

In the final analysis, the problem resolves itself into a consideration of the relative merits of (1) judgment by two-thirds of the members of the legislature coupled with the likelihood of the disappearance of the use of the referendum and (2) judgment by the supreme court as to the existence of an emergency coupled with the possibility of continued existence of the referendum as a check on the legislature. The choice is a purely personal one.

ROBERT B. GOSLINE